No. 91-779

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF AMICUS CURIAE OF THE MONTANA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE MONTANA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Montana Trial Lawyers Association (MTLA) is an incorporated, voluntary association of Montana attorneys whose objective is to uphold and defend the Constitution of the United States; to advance the science of jurisprudence; to train in advocacy; to promote the administration of justice for the public good and to advance the cause of those who are damaged in person or property and who must seek redress.

Counsel for petitioner and counsel for respondents have submitted letters consenting to MTLA's participation as amicus curiae. These letters are on file with the Clerk. The MTLA supports the respondent's position that the Montana venue statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

MTLA files this amicus brief to address its concerns on the following issues:

1. There is a rational basis for Montana's venue statute. The Montana Legislature has specifically determined that the fundamental rule of venue in Montana is the residence of the defendant, and if the defendant is a foreign citizen, natural or corporate, it has no residence and can be sued in any county. This rule prohibits foreign natural citizens and corporations from unilaterally establishing venue in a Montana county by simply declaring such county to be its principal place of business in Montana, all without having established a Montana residency.

2. To the extent that Montana's venue statute treats foreign corporations differently than domestic corporations, the differences are not constitutionally significant when viewed in the context of the numerous procedural tools available to all litigants to assure an impartial forum. In particular, the right to exercise a peremptory challenge to an assigned judge, to seek a change of venue, and to exercise challenges to prospective jurors.

3. Montana's "open court policy", established by its Constitution, is separate and distinct from Montana's venue requirements. The Montana Supreme Court has already determined that the "open court policy" has not disadvantaged or otherwise abused petitioner.

ARGUMENT

I. *MONTANA VENUE LAW HAS RATIONAL BASIS.*

A. *Legislative History Shows Rational Basis.*

The BN contends there is no legislative history revealing the purpose of the Montana venue statute. The BN went to the effort to set forth a statutory appendix at 1(a) which glaringly leaves out the purpose of the Montana venue statute.

The BN correctly points out that Montana venue statutes were originally enacted in 1864. What the BN does not point out is that in 1985, the Legislature, after having enlisted the assistance of the Montana Supreme Court Commission on the Rules of Evidence, totally revised the Montana venue statutes. [1]

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[1] *Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence:* Chapter 432, L. 1985, was enacted based on recommendations to the Legislature as indicated in the following preface to the report that accompanied the introduced bill (Senate Bill 91):

> "This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme

On page 15 of Montana Code Annotated, CHAPTER 2, VENUE, pertaining to the discussion of 25-2-118, the very statute which BN now contends has no rational basis, the following legislative history is set forth:

> *25-2-118. Residence of defendant.*
> Evidence Commission Recommendations for Revisions.
> *Explanation:* This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108 [renumbered 25-2-118], which states the most fundamental of all venue rules-that the defendant has the right to have the trial in his county of residence...
> Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue [residence of defendant] ...
> Subsection (2). This provision clarifies the portion of section 25-2-108 [renumbered 25-2-118] dealing with nonresident defendants. Since, by definition, a nonresident of the state is not resident in *any* county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

Id. at 15-16.

> Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that 'statutory provisions on venue ... accurately reflect the current usages and interpretations of those laws...'
> The Resolution recognized that the existing statutes 'no longer reflect on their face the present state of the law,' and expressed a desire that new draft statutes be prepared incorporating the 'logical, useful, and consistent' rules and practices which have evolved by judicial construction of the present laws.
> The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language.
> * * *
> The new statutes proposed in this draft have three objectives:
> (1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;
> (2) to change the language, without changing the meaning, of the sections that have caused the most litigation;
> (3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations."

Montana Code Annotated, Chapter 2, Venue, p. 10.

The BN seems to be arguing that the subject venue statute is unconstitutional because of the way it affects non-resident corporations who have opted to designate a principal place of business in Montana, but who have not opted to become Montana residents. It is important to point out that Section 25-2-118, MCA specifically pertains to all non-resident defendants, whether they be non-resident natural citizens, non-resident corporations with no principal place of business in Montana, or non-resident corporations with a principal place of business designated in Montana.

Montana is a state whose major industry, next to agriculture, is tourism. Hundreds of thousands of people travel into Montana every year as tourists. The legislature has determined that if these persons commit torts in Montana, they can be sued in the county where the tort occurred, or any county where the injured party chooses to file the action. The legislature has determined that a defendant's residence is the fundamental venue rule and the rule simply cannot apply to a non-resident defendant. This is not only a rational rule, it is the only conceivable rule, unless, of course, the BN is contending that such out-of-state natural citizens should be able to arbitrarily determine the county that they would like to designate as the forum for the suit.

Exactly the same rationale applies to the non-resident corporation which has not chosen to label one of the 56 counties its "principal place of business in Montana". There simply is no other rational rule than the one set forth by the legislature in 1985.

Finally, the statute also applies to non-resident corporations which have property and agents spread throughout Montana, and which have arbitrarily chosen to call one county its principal place of business. That non-resident corporation also has no residence in the State of Montana, and can be sued in any county.

It is hard to imagine a state having a more comprehensive up-to-date legislative history than Montana's 1985 total revision of its venue statutes. The objectives of the Supreme Court Commission and the legislature have been set forth, specifically, above. The Supreme Court Commission and the legislature reaffirmed the fundamental rule of venue in 1985. Because the legislature has found that the most fundamental venue right of a defendant is to be sued in the county of his residence, and because, by definition, a non-resident has no residence in any county, the legislature has reached the rational conclusion that such non-resident can be sued in any county. The Montana Supreme Court Commission on the Rules of Evidence and the legislature have spoken, and have explained their rational basis for the rule, and the inquiry must stop here.

B. *Looking Beyond the Legislative History.*

If, for the sake of argument, one were to state that the legislative history, discussed above, were not sufficient to absolutely prove the rational basis, one merely needs to apply the language of this Court in *Metropolitan Casualty*

Insurance Co. v. Brownell, 294 U.S. 580 (1935), which only requires a state of facts which "reasonably may be conceived" to justify the statute. Therefore, the reasonable bases of the legislation, in addition to the legislature's stated purpose, should be reviewed.

The rational basis for this rule is to prevent a foreign corporation, like BN, from hand-picking a county where it wishes to be sued without becoming a Montana resident.

For instance, according to the Affidavit of Mark C. Bruce, (Pet. App. 4(a): JA 20-21), some time during the year 1989, BN chose Havre as its self-designated principal place of business. By moving its principal place of business from Yellowstone County where it had been for years and years, to Hill County, where Havre is located, the BN hopes to be sued only in Havre, where the BN literally controls the town. This is precisely the tact which the Montana Supreme Court Commission on Evidence and the Montana legislature were preventing in 1985. If this were not the rule, a foreign corporation, like the BN, without becoming a resident of Montana, could randomly choose any county it desired as its principal place of business, thereby forcing all tort victims to sue it in its hand-picked county.

The BN's position that it ought to be able to hand-pick the county where it will be sued, becomes much more serious when applied to the BN, a national railroad, whose employees are forced to work throughout the state, in locations sometimes greater than 500 or 600 miles apart. Under such circumstances, the BN could force an injured worker to file suit against the BN in Havre, or any other hand-picked, out-of-the-way venue, when the employee was injured hundreds of miles away. The legislature specifically chose to avoid that problem, as the legislative history so states.

It must be noted, however, that in order to assure impartiality in the choice of venue, the legislature, in 1985, passed the other venue statute, 25-2-201. See argument set forth in section II(B)(2), *infra*.

Another rational reason for this law is that the Supreme Court Commission on Evidence and the Montana Legislature knew that if a railroad or other foreign corporation could hand-pick its venue by designating the county where it chose to be sued without becoming a resident, the corporations could force claimants to travel to far reaches of the State, which would put a heavy financial burden on the injured, out-of-work claimants. For instance, the BN has chosen Havre. In Havre, there is no interstate highway, there is no jet air transportation, there is no adequate airport, and there is no major medical facility.

BN continuously states that a resident can only be sued in the county of its residence, whereas non-residents can be sued in any county. This is not correct. A resident can only be sued in the county of his residence, or, if he ventures outside that county and commits a tort, he can also be sued in the county where the tort occurred. Most Montana residents, as a practical matter,

are going to be involved in litigation arising out of the county of their residence, unless they leave that county and commit a tort in another county, or agree to perform a contract in another county. A non-resident defendant, whether corporate or a natural citizen, is not going to have the same type of local tie to a county, and hence can be sued in any county, subject to the express statutory authority *mandating* the district judge to change the place of trial if there is a showing that a defendant cannot receive a fair trial in the county where the case was originally filed, or if, in a non-FELA case, the convenience of witnesses would be better served. (See argument in paragraph II(B)(2), *infra*.).

The BN attempts to argue that the venue statute in question creates discrimination between resident corporations and non-resident corporations. However, the statute is in no way restricted to non-resident corporations, but applies to all non-residents, natural citizens and corporations. Query: Does the statute violate equal protection guarantees for non-resident corporations, but not for non-resident natural persons?

C. *To Hold with the Hare and Run with the Hound.*

The BN has attempted to convince this Court that *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), is the controlling law, and that *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37, 48 L.Ed 604, 607-08 (1904), and *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 644-45, 48 L.Ed.2d 263, 271 (1976), are not the law. What the BN tells this Court in the case at bar is not what the BN told the Montana Supreme Court in *Haug v. BN*, 770 P.2d 517 (Mont. 1989), a case cited by BN in its brief. Haug, a Montana resident, was injured in Livingston, Montana, where he was employed by the BN. He chose to bring his FELA action in Cascade County and the BN moved to change the venue to Park County, claiming that Haug could only bring the case in the county where he was injured, relying on *McAlear v. Kasak*, 731 P.2d 9087 (Mont. 1987), where the court, after the 1985 amendment to the Montana venue statutes, had ruled that a non-resident could only be sued in the county where the tort occurred. [This decision was overruled in *Haug v. BN*, 770 P.2d 517]. The result of the *McAlear* decision was that a non-resident plaintiff, because of Montana's Constitution, could sue a non-resident defendant in any county in the State, whereas a resident plaintiff could only sue a non-resident in the county where the tort occurred. BN's position on this issue caused Haug to point out to the Montana Supreme Court that if the BN's position were correct, there would be an equal protection violation against Haug because BN's reading of the venue statute would discriminate against resident plaintiffs and in favor of out-of-state plaintiffs.

The BN responded to this equal protection issue in its reply brief in *Haug v. BN*, No. 88-438 in the Supreme Court of the State of Montana, by arguing

directly contrary to its present argument. The verbatim argument of the BN to the Montana Supreme Court is set forth below.

> *Different venue treatment does not result in denial of equal protection and is not otherwise unconstitutional:* (italics added)
> "It is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefor a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."
> *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 644-45, 48 L.Ed.2d 263, 271 (1976) (quoting *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37, 48 L.Ed 604, 607-08 (1904).
> In light of this standard, Haug's bald assertions of unconstitutionality are meritless.

See pages 5 and 6 of Appellant's Reply Brief, *Haug v. BN*, No. 88-438.

On November 11, 1988, in *Haug*, the BN told the Montana Supreme Court that different venue treatment does not result in the denial of equal protection and further told the Montana Supreme Court that this Court's ruling in *American Motors Insurance Co. v. Starnes*, 425 U.S. 637, and *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, set forth the appropriate standard. Now the BN is trying to convince this Court that the holdings of *Starnes* and *Snell* are not the law and that the law really is as set forth in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), which is inapposite, at the very least.

The BN's argument is disingenuous. In light of what it argued to the Montana Supreme Court in *Haug*, the BN should not be allowed to "hold with the hare and run with the hound." See *Humphrey, Robert: Complaint for Reformation* (1572).

Based on all of the authority of this Court, there simply is no question but that 25-2-118 has a rational basis and does not violate the Equal Protection Clause of the Fourteenth Amendment.

II. *THE MONTANA VENUE STATUTE DOES NOT EFFECT ANY REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS.*

This Court has found that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great West United Corp.*, 443 U.S. 173, 183-84 (1979). These concerns with unfairness and inconvenience are equally applicable to state venue requirements.

In challenging Montana's venue statute, BN has focused on the question of unfairness. It has not argued with any conviction that the venue statute, as applied to the pending suits, creates any inconvenience to BN. Indeed, such a claim would be untenable given that the venue is in Billings (Yellowstone County). Billings is not only the most populous city in the State, but is also only 80 miles from the State of Wyoming - the state of the alleged injuries to the plaintiffs. In contrast, the city of Havre, Montana (Hill County), where BN claims to maintain its principal place of business, is over 300 miles to the north on Montana's Canadian border.

The question of whether Montana's venue statute creates any real and substantial discrimination must therefore focus on the issue of "unfairness".

BN contends that Montana's venue statute lends itself to forum shopping by plaintiffs "who take out-of-state corporations to court in Montana and take free advantage of idiosyncrasies in the bench and jury venire in selected county courts, to the obvious disadvantage of these multi-state businesses incorporated elsewhere." (Brief for Petitioner, p. 38-39).

There is an unspoken assumption in BN's argument that the judges and jurors in Yellowstone County will be somehow less fair and unbiased than judges and jurors elsewhere. Further, there is an assumption that the law will be applied differently in Yellowstone County than in other counties. There is no basis for these assumptions.

If a defendant corporation nonetheless suspects bias by the judge or jury venire, it has numerous procedural devices available to correct the situation. The defendant (as well as the plaintiff) can, for no stated reason, move to substitute a new judge to replace the assigned judge. In selecting the jury, each defendant can exercise four peremptory challenges and an unlimited number of challenges for cause. If the defendant can show an inability to obtain an impartial trial in the designated venue, it can move to have the venue changed to another county, and the trial court *must* change the venue.

A. *If the Discrimination in Question is Insignificant, There is No Equal Protection Violation.*

The fact that all discrimination in venue statutes is not necessarily significant or substantial is illustrated by this Court's decision in *American*

Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976). In *Starnes*, the Court upheld a Texas venue statute against an equal protection challenge. Under the Texas venue statute, domestic corporations had to be sued in the county in which they were domiciled unless the plaintiff, at a preliminary hearing, could prove by a preponderance of the evidence that he had a cause of action. Foreign corporations could be sued in counties other than their Texas domicile without a similar procedural requirement. The appellants contended that, as a foreign corporation, it was denied the unique opportunity afforded domestic corporations to preview the adversary's case, cross examine plaintiff's witnesses and nip a frivolous claim "in the bud." *Id.* at 642-43.

As BN acknowledges in its brief (Petitioner's Brief, p. 35) the Court determined, during oral argument of *Starnes*, the showing actually required of domestic corporations was merely a *prima facie* showing; that in light of the many and far more extensive discovery tools equally available to all litigants, the overall effect of the different treatment of domestic and foreign corporations was negligible. Accordingly, the Court concluded that the Texas venue scheme presented no denial of equal protection.

B. *The Difference Between Domestic and Foreign Corporations Under Montana's Venue Statute is Negligible in Light of the Many Procedural Safeguards Against Bias or Prejudice.*

BN seeks to have the Montana venue statute declared unconstitutional on the assumption that it unfairly subjects foreign corporations to the idiosyncracies in the bench and jury venire in selected counties. There is nothing in the record which would support a conclusion that BN is less likely to receive a fair and impartial judge and jury in Yellowstone County than it is in Hill County. On the contrary, a review of Montana's history and statutory law compels a conclusion that impartiality is assured in Yellowstone County, as well as any other Montana county.

In *Starnes*, this Court did not confine itself to the language of the challenged venue statute. *Starnes* at 645. Rather, the Court relied upon statements made during oral argument as to how the Texas statute was implemented in practice.

In the present cases, the Court likewise should not confine itself to the language of the Montana venue statute in question. It should ascertain the practical effect of the venue law in the context of the other Montana statutory procedures designed to eliminate any prejudice arising from venue selection. These safeguards are discussed below.

1. *Substitution of Judge.*

Burlington Northern is not the first foreign corporation to feel that it is being victimized by Montana's venue statutes. The issue was brought to a

head during the copper wars of 1903. The issue was resolved through adoption of the "fair trial" bill. The venue statute in question must be judged in the context of that history and the legislation which was forced upon the State of Montana by a foreign corporation, the Anaconda Copper Mining Co., to gain relief from the venue statute.

At the turn of the century, Montana's economy (mining & timber) was dominated by Anaconda Copper Mining Company (Standard Oil). In 1903, Anaconda Copper was having great difficulty dealing with a young mining entrepreneur named F. Augustus Heinze, in Butte, Montana - then known as the "richest hill on earth." Heinze directed his minions to purchase stock in two of Anaconda's subsidiary corporations. The Heinze agents then brought suit alleging that, under Montana law, Anaconda Copper was an illegal trust. The presiding judge was Judge William Clancy who, by then, had a record of handing millions of dollars worth of stolen property over to Heinze. Howard, Joseph Kinsey, *Montana: High, Wide, and Handsome*, Yale University Press, New Haven, 1959, pps. 73-84. As anticipated, Judge Clancy ruled with Heinze. In response, Anaconda Copper immediately shut down all operations in the State of Montana - Butte's mines, Anaconda's smelter, Great Falls' copper refineries, Missoula's lumber mills, coal mines, gold mines and company stores. Twenty thousand men were out of work the next morning. *Id.* at 75. After a few weeks of economic pressure, Anaconda let it be known that if Montana's governor would call a special session of the legislature and pass a "fair trial" bill, Anaconda might reopen its mines. *Id.* at 80. The "fair trial" bill allowed any party to a suit to charge (without proof) that a judge was biased, thus forcing him to recuse himself and call in a new judge.

On December 1, 1903, the Governor called the special session and the "fair trial" bill passed as a matter of course.[2] In a twist of fate, Heinze's judges were defeated in the next election in favor of Anaconda's candidates. Anaconda had shut down the State of Montana in order to pass the "fair trial" bill. That very bill subsequently allowed Heinze to thwart Anaconda's judicial steamrolling in later years. *Id.* at 81. The constitutionality of the "fair trial" bill was upheld by the Montana Supreme Court in *State ex rel. Anaconda Copper Mining Company v. Hon. William Clancy*, 30 Mont. 529, 77 Pac. 312 (1904).

The substance of the 1903 "fair trial" bill is still on the books in Montana

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[2] "An Act to Amend Section 180 of the Code of Civil Procedure." Section 180 was amended by adding subdivision 4 which provided as follows: "When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge... Upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action.*** No more than five judges can be disqualified for bias or prejudice, in said action or proceeding.***" This was then re-enacted as Section 6315 Rev. C. 1907.

although substitutions are now limited to one per side rather than the original five. Section 3-1-804, MCA (1991) provides:

> 1. A motion for substitution of a district judge may be made by any party to a proceeding only in the manner set forth herein. In a civil or criminal case, each adverse party, including the state, is entitled to one substitution of a district judge.
> (a) A motion for substitution of a district judge shall be made by filing a written motion with the clerk, as follows:
> "The undersigned hereby moves for substitution of District Judge in this case."

Montana is one of only three states (Alaska, Montana, and New Mexico) that allow for a peremptory challenge to a judge without any mention or showing of prejudice. *Disqualification of Judges for Prejudice or Bias*, (1969) 48 Ore. L.Rev. 311, 346.

If BN is of the opinion that FELA plaintiffs, like Heinze, are taking "free advantage of the idiosyncrasies in the bench" (Petitioner's Brief, p. 38), then BN should avail itself of Anaconda's "fair trial" legislation and move to substitute the judge under 3-1-804, MCA. The motion requires no evidence or proof of prejudice. The substitution is automatic with no questions asked. This procedural tool completely defuses BN's contention that it is suffering any substantial discrimination or prejudice as a result of Montana's venue statutes. Any advantage that a plaintiff may have in this respect is more than offset by the defendant's ability to substitute a new judge. As in *Starnes*, the overall effect of the difference is negligible and does not constitute a denial of equal protection.

2. *Change of Venue.*

BN argues that Montana's venue system allows plaintiffs to take advantage of idiosyncrasies in the jury venire as well as on the bench. Montana law, however, provides adequate procedural safeguards to protect against any concerns that BN may have as to its ability to receive a fair trial in the selected venue.

In the present cases, BN filed motions pursuant to 25-2-114, MCA to change the place of trial to BN's "principal place of business" - Hill County (Havre) Montana. Section 25-2-114, MCA allows a defendant to challenge the venue if suit is brought in a "county not designated as the proper place of trial." Despite having lost such a motion, a foreign corporation still has other procedural tools available if it believes it cannot obtain a fair trial. Section 25-2-201, MCA provides:

> When a change of venue required. The court or judge must, on a motion, change the place of trial in the following cases:
>
> (1) when the county designated in the complaint is not the proper county;
> (2) when there is reason to believe that an impartial trial cannot be had therein;
> (3) when the convenience of witnesses and the ends of justice would be promoted by the change.

The Montana Supreme Court has ruled that a foreign defendant can be sued in any county in the State. Since any county which is selected by the plaintiff is a proper county for venue purposes, "a non-resident defendant is not entitled to a change of venue for the reason that the plaintiff has chosen an improper county under 25-2-201(1) MCA." *Haug v. Burlington Northern RR Co.*, 236 Mont. 368, 371-72, 770 P.2d 517 (1989). Nevertheless, the defendant still has the opportunity to invoke subsections 2 and 3 of 25-2-201, MCA which mandate a change of venue for more substantive reasons - inability to obtain an impartial trial and promotion of the ends of justice.[3]

Although the District Court ruled that Yellowstone County was properly designated as the county for venue under 25-2-114, MCA and 25-2-201(1) MCA - if a foreign corporation can substantiate its belief that it cannot receive an impartial trial in Yellowstone County, it can, nonetheless, invoke subsection 2 of 25-2-201, MCA and seek to have the matter moved to another county.

As this Court has recognized, fairness and convenience are the two primary factors in determining venue. *Leroy v. Great West United Corp.*, 443 U.S. 173, 183-84 (1979). Montana's change of venue statute, 25-2-201, MCA offers protection to a defendant on both counts. Subsection 2 allows for change of venue if an impartial trial cannot be had. Subsection 3 allows for change of venue in the interests of justice and witness convenience. In discussing this safeguard, the Montana Supreme Court has stated in *Putro v. Mannix Electric, Inc.*, 147 Mont. 314, 412 P.2d 410 (1966),

> [A] change of place of trial must be by the Court ordered "when the convenience of witnesses and the ends of justice would be promoted by the change." The provisions of this section are mandatory,

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[3] Although the Montana Court in *Haug* found that a FELA defendant cannot invoke *forum non conveniens* for convenience of witnesses, the issue before this Court is not confined to FELA actions. Rather, the constitutionality of the Montana venue statute, on its face, is at issue. The venue statute must therefore be judged in light of procedural tools available to defendants in a normal, transitory action.

> and require the district court to change the venue, ... after a motion has been made and a sufficient showing made by the defendant.

Id., P.2d at 412.

As in the *Starnes* decision, Montana's change of venue laws render any arguable disadvantage to a defendant negligible. There is no significant or invidious discrimination against defendants, be they domestic or foreign, corporate or natural.

3. *Challenges to Jurors.*

In addition to substituting a judge and moving for a change of venue for inability to obtain an impartial trial, a defendant has the added protection of challenges to the prospective jurors.

Montana law allows a litigant to challenge jurors for cause, Section 25-7-223, MCA. The law does not place a limit on the number of challenges for cause that may be exercised by a party so long as the challenges fall within the criteria set forth in the statute. Section 25-7-223, MCA sets forth seven grounds for challenge for cause, including: (6) having an unqualified opinion or belief as to the merits of the action; and (7) the existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

Further, Section 25-7-224, MCA allows each party to exercise four peremptory challenges in the selection of a twelve-person jury.

The right to exercise peremptory challenges and challenges for cause affords the foreign corporation further protection against any prejudice that may exist by virtue of the plaintiff having chosen the venue. These safeguards, when combined with the right to substitute a judge and move for a new venue, place the parties on an equal footing in their quest for impartial justice.

BN is asking this Court to assume that BN cannot receive a fair trial in a venue selected by the plaintiff. There is no evidence to support such a conclusion. Furthermore, in order to reach this conclusion, the Court would have to ignore the fact that BN has adequate tools to assure impartiality. The Fourteenth Amendment protects fundamental rights, not the particular forum which a state deems proper. If BN is assured of impartiality in a tribunal where equal laws prevail, it is not being denied equal protection of the laws. *Cincinnati Street R. Co. v. Snell*, 193 U.S. 30, 36-37 (1904).

In practice, given the procedural tools afforded each party, there is no real discriminatory effect resulting from Montana's open-ended venue statute as applied to foreign corporations or natural citizens. Application of the venue statute does not deny BN equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. *NO REAL OR SUBSTANTIAL DISCRIMINATION.*

A. *The Montana Supreme Court has Repeatedly Found No Discrimination.*

The BN claims that the Montana venue system creates real and substantial litigation disadvantages. In support of such contention, BN has filed affidavits attempting to show the number of cases filed against it in Yellowstone County and Cascade County by out-of-state railroad workers, who were injured out of state. These out-of-state railroad workers are entitled to bring such actions in Montana, pursuant to Montana's "open court policy", which is based directly on Article II, Section 16 of the 1972 Montana Constitution. The BN repeatedly refers to this "open court policy" and the fact that it can be sued in FELA cases in Montana by non-resident plaintiffs. The BN is attempting to somehow turn this constitutional right into an argument that the Montana venue statute is unconstitutional. This argument on the part of the BN is nothing but a "red herring" and should be ignored totally. It simply has no relevance to the equal protection issue before this Court. Furthermore, whatever determination may be made concerning the constitutionality of 25-2-118, MCA, the constitutionally mandated "open court policy" of the State of Montana will remain.

However, because the BN has raised such a clamor about its self-perceived discrimination, it appears that some response needs to be made to this contention.

Before this Court is swayed to any extent by the BN affidavit or the list of FELA cases filed in Montana, this Court should be aware that the Montana Supreme Court has determined on three separate occasions that there simply is no basis for the BN's claim that it has been prejudiced or has somehow suffered real and substantial litigation disadvantages because of the constitutionally mandated "open court policy".

In *State ex rel. Great Northern Railway Co. v. District Court*, 365 P.2d 512 (Mont. 1961), one of BN's predecessors attempted to convince the Montana supreme Court that Montana's "open court policy" of allowing out-of-state railroad employees injured out of state to bring their action in Montana in any county which was convenient for the railroad worker created substantial litigation disadvantages for the railroad. The Supreme Court, after reviewing all of the bases which the railroad could present, stated as follows:

> Having these considerations in mind, if it appeared that a great number of such actions were being filed in Silver Bow County we would be adverse to permitting the practice to continue. However, from the record before us it appears that eighteen of such actions have been filed there in the past eleven years, which would not indicate a trend, as of this time, of importing this type of litigation.

> Since our sister state has not seen fit to adopt the rule, and by reason of the other matters hereinbefore set forth, we do not feel justified in this instance to establish the rule. We do state, however, that if a substantial increase in this type of litigation is called to our attention in the future we will re-examine the situation in light of what we have herein stated.

Id. at 514.

Eighteen years later, after the Great Northern Railroad had merged into BN, BN again tried to convince the Montana Supreme Court that it was incurring substantial litigation disadvantages because of the procedure allowing out-of-state railroad employees to sue in Montana. Again, the Montana Supreme Court, having reviewed all of the information available from the courts of the State of Montana, found there was no substantial increase in this type of litigation and refused to prevent this type of litigation. In this regard, the Court stated:

> We repeat the warning set forth in *State ex rel. Great Northern Ry., supra*, 139 Mont. at 457, 365 P.2d 514. "[I]f a substantial increase in this type of litigation is called to our attention in the future we will examine the situation in light of what we have herein stated."

LaBella v. Burlington Northern, Inc., 595 P.2d 1184, 1187 (Mont. 1979).

Montana's "open court policy" is not simply a policy, but is *constitutionally mandated*. As the Court in *LaBella*, stated:

> The policy of the State of Montana is clearly announced in the State Constitution. "Courts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character." 1972 Mont. Const., Art. II, Section 16. This constitutional right is unrestricted by reference to residence or citizenship.

LaBella, at 1187.

Later in 1979, the BN again tried to convince the Montana Supreme Court that too many of these types of cases had been filed and that the BN was suffering substantial litigation disadvantages. In *Bevacqua v. BN*, 598 P.2d 1124 (Mont. 1979), the Court again found against the BN and stated:

> Our decision in this case is controlled by *LaBella v. Burlington Northern* 1979, Mont., 595 P.2d 1184, 36 St.Rep. 1016. The doctrine of *forum non conveniens* must be tempered with the open

door policy as stated in *LaBella*, and there is presently no reason that causes us to apply it to FELA actions, as there has been no demonstrated abuse.

Bevacqua at 1125.

Eight years later, the BN tried again. In the case of *State ex rel. BN v. District Court*, 746 P.2d 1077 (Mont. 1987), the BN once again claimed that this "open court policy" was causing it real and substantial litigation disadvantages. Once again, the Montana Supreme court, *after reviewing all of the information available in the State of Montana*, specifically found contrary to the assertions of BN.[4]

In the cases at bar, the BN again presented the Montana Supreme Court with all facts it could muster in support of its claim that it was suffering real and substantial litigation disadvantages because of the "open court policy".

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[4] Burlington Northern also filed statistics obtained from the Montana State Judicial Information System. From those statistics, it appears that in 1986, there were 16,397 civil filings statewide of which 1,828 related to tort. The numbers increased for 1984, when there were 15,045 civil filings statewide, of which 1,640 represented tort actions.

The statistics provided by Burlington Northern in its applications fail to meet the "substantial increase" in FELA cases so as to show an intolerable burden of this state in maintaining its "open door" policy and meeting the obvious intention of the federal statute that the plaintiff could make a choice of forum in which to try his FELA claim. Burlington Northern concedes that most FELA cases are settled before they ever go to trial. The pendency of two FELA cases in the District Court of Cascade County, two in Yellowstone County, and one each in Missoula County, Silverbow County, and Park County are insufficient in number to cause this Court to move from its settled decision in the earlier cases to maintain the "open door" policy and to follow the provision of our Montana Constitution that "courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or character." Art. II, Section 16, 1972 Mont. Const. *LaBella*, 182 Mont. at 207, 595 P.2d at 1187.

The budgetary figures presented for Yellowstone and Cascade Counties represent the total operation of the whole District Court, and all the cases, civil and criminal, that come before those courts. There are three district judges serving the Eighth Judicial District, including Cascade County, and five district judges serving the Thirteenth Judicial District, including Yellowstone County. Although the district judge in Yellowstone County indicated that a trial may not be available in that county for two years, it does not appear that the removal of two cases from its docket will substantially lessen the burden on that District Court, nor would the elimination of seven cases statewide have a like effect on all state courts. Seven pending FELA cases, where there are over 16,000 civil cases filed statewide per year is not a significant number of cases as to require the exercise of our power of supervisory control.

* * *

In the light of the statements of this Court and *LaBella*, *supra*, and earlier cases, and the paucity of evidence submitted by the applicant that pending FELA cases are a burden on the Montana courts or the taxpayers of this state, and applications in each cause for a writ of supervisory control are denied.

State v. District Court at 1080 and 1081.

Once again, the Montana Supreme Court found that BN was not suffering any substantial litigation disadvantages and that there was no reason to set aside the constitutional "open court policy" of Montana. It seems strange, indeed, for the BN to attempt to convince this Court that it somehow is suffering real and substantial litigation disadvantages when the Montana Supreme Court, which is absolutely in the best position possible to rule on the issue, has re-examined the situation and has found that there is no problem.

Suffice it to say that BN's claim of substantial litigation disadvantages should be totally ignored by this Court, and this Court should accept the findings of the Montana Supreme Court from 1961, to date, as conclusive on this issue.

B. *Yellowstone County is not an Inconvenient or Illogical Venue for BN.*

The BN claims that it is being severely prejudiced by having the two underlying FELA claims brought against it in Yellowstone County. Of course, Section 56 of the FELA, 45 U.S.C., Section 56, reads as follows:

> Under this chapter an action may be brought in a district court of the United States, in the district residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business as the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

Id. at 1186.

Therefore, Congress found it was perfectly appropriate for a railroad to be sued in an FELA case in any district in the United States where it shall be doing business. The BN seems to imply to this Court that Yellowstone County, where Billings is located, is somehow a foreign ground for the BN. It claims on page five of its brief:

> The BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the State is in Hill County.

BN's involvement in Yellowstone County is much more expansive than the mere ownership of some trackage. For instance, until late 1989, BN had its corporate headquarters, its superintendent, and its claims department in Billings, which was the absolute hub for the BN operations in the State of Montana.

Sometime in 1989, the BN chose to move some of its corporate personnel 300 miles away to an extremely small county on the Canadian border where

Havre is located. Havre is a town in which 900 of BN's 1,700 employees work. According to the Affidavit of Mark C. Bruce, the BN closed its regional and divisional offices in Yellowstone County some time prior to October 4, 1989, and moved its principal place of business to Havre. Of course, in Montana, there is no legal requirement, nor any legal procedure for moving a foreign corporation's principal place of business from one county to another. The foreign corporation simply elects when, how, and where it chooses to call its principal place of business.

In any event, even though the BN claims to have moved its "principal place of business" to Havre, it has maintained its claims office in Billings and its retained counsel, Kurt W. Kroschel & Associates, who handles all of the FELA claims in Montana, is also located in Billings, Yellowstone County.

Furthermore, Billings, Montana, is the largest city in the State of Montana. The only other city in Montana where BN does business, which is a hub of any type, is Great Falls, located in Cascade County. There is virtually no other city, besides Great Falls and Billings, where the BN does business which has any reasonable air transportation, any reasonable medical community, or any reasonably sized court facility. For instance, Billings has five district judges, and Great Falls has three district judges, while the rest of the State, where the BN does business, is extremely limited in its court facilities.

It comes as no surprise that FELA cases against the BN in Montana are brought in Billings, Yellowstone County, and in Great Falls, Cascade County. These are the only two centers of the railroad industry in Montana, and they are, by far, the most convenient venue for injured FELA claimants, the witnesses, the doctors who, for the most part, reside in Great Falls or Billings, and BN's counsel and claims department.

Furthermore, out-of-state witnesses brought in by the claimants and the BN simply cannot reach Montana by reasonably afforded air service anywhere the BN does business, except in Great Falls and Billings. It is hardly surprising, under these circumstances, that Yellowstone County and Cascade County are the recipients of several FELA case filings by out-of-state injured railroad workers.

For the BN to raise an alarm about being prejudiced by having to defend FELA cases in Cascade County and Yellowstone County, under these circumstances, especially when the Montana Supreme Court has repeatedly held that there is no abuse, strains credibility, to say the least.

The BN and the amici who have filed briefs on behalf of the BN, attack the subject venue statute, mainly on the ground that out-of-state plaintiffs can come to Montana and sue the BN, even though the out-of-state plaintiffs were injured out of state. The fact that such out-of-state plaintiffs can come into Montana and bring lawsuits against the BN under the FELA is a situation created by the 1972 Montana Constitution. It is not for this Court to determine if the "open court policy" of the State of Montana, based on its state

constitution, is appropriate in FELA cases.

Suffice it to say that the Montana Supreme Court has already determined there is no real or substantial discrimination by the filing of out-of-state FELA claims in Montana. Furthermore, the issue on appeal is the constitutionality of the Montana venue statute, and such issue should not be obscured by the BN's constant referral to the "open court policy" of the State of Montana.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED,

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